additional ground that, on the evidence, the defendants had been in breach of section 29(1) of the Act and that that breach had caused the accident. In allowing the application Willmer L.J. stated the well-known principle that the position of a respondent on appeal is quite different from that of the appellant who must confine his arguments to the points taken below but that the respondent is not precluded from taking any point in support of the judgment which he has obtained.

Winn L.J.'s judgment requires notice. He emphasised the fact that there was still a live question on the claim founded on section 29(1) which was clearly pleaded. Had this been expressly abandoned he said he would not have agreed to grant the application. He said this (page 853):

"I accordingly look at the matter on the footing that the claim was both pleaded and alive when the judge came to deal with the matter, in the sense that it had not been expressly abandoned. Had it been abandoned, I would have thought it quite wrong to grant the leave which the court is now granting to introduce the matter at this stage."

Although the facts in both the present and *Thomas'* case are dissimilar, the factors are not. In both cases the parties who sought to contend the additional point before the court of appeal are the respondents. Therefore they both can take advantage of the principle gleaned from *Thomas'* case if they come within that principle. Now in my opinion, the true scope of the principle in *Thomas'* case is that it is confined to cases where there is still a live question to be decided on a claim which is clearly pleaded. In *Thomas'* case the claim under section 29(1) was pleaded and still alive in the sense that it was not expressly abandoned. In our present case the claim to contend the first limb of section 16(1)(d) of the Act was not even pleaded, much less a live question. Therefore the landlord/respondent is not entitled to take advantage of the principle enunciated by Willmer L.J. in *Thomas'* case. Accordingly his counsel's proposition to put forward the line of argument propounded by Willmer L.J. cannot be entertained because it is devoid of merit.

Ali and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Thevin, Chandaran & Siva; Soo Wai Sun & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. E.D.C.

[F.C. (Azmi L.P., Suffian C.J. and Ong Hock Sim F.J.) May 10, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 57 of 1973]

Income Tax — Double taxation — Person ordinarily resident in Malaysia receiving income from Singapore — Tax for year of assessment 1969 — Whether Singapore income liable to Malaysian income tax — Double Taxation Relief (Republic of Singapore) Order, 1966 — Repealed law — Double Taxation Relief (Singapore) Order 1968 — Supplementary agreement entered into after judgment in High Court — Double Taxation Relief (Singapore) Order, 1973 — Whether amendment retrospective in effect — Income Tax Act, 1967.

This was an appeal from the decision of Gill F.J. (reported in [1973] 2 M.L.J. 22) where he held that the exemption granted by the 1966 Order continued to be operative in the year 1968 and therefore the respondent was exempt from tax on his income from Singapore for the year of assessment 1969. After the judgment was given a supplementary agreement was entered into between the Malaysian and Singapore Governments and the supplementary agreement was given the force of law by the Double Taxation Relief (Singapore) Order, 1973. This order was given retrospective effect and provided that paragraph 2 of Article XXI of the 1968 agreement shall not extend the 1966 agreement beyond the last day of the year of assessment 1968.

Held (Azmi L.P. and Ong Hock Sim F.J., Suffian C.J. dissenting) dismissing the appeal: (1) the amendment was enacted for the sole purpose of ensuring continuity and removing any doubt that the year 1968 was a year of no agreement when neither the 1966 agreement nor the 1968 agreement was applicable and in the context of the whole agreement "the year of assessment 1968" should be read as defined in section 2 to mean the "calendar year 1968";

(2) the amendment was intended to rectify an obvious omission and is retrospective and therefore the appeal should be dismissed.

Cases referred to:-

(1) *Attorney-General* v. *Vernazza* [1960] 3 All E.R. 97 at p. 101.

(2) *Quilter* v. *Mapleson* (1882) 9 Q.B. D. 672.

(3) *Stovin* v. *Fairbrass* (1919) 88 L.J. K.B. 1004.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellant.

J. Puthucheary for the respondent.

Suffian C.J. (Malaya) (read by **Ong Hock Sim F.J.**): We are concerned with income tax payable by Mr. E.D.C. (respondent) for the year of assessment 1969.

The facts briefly are as follows. The respondent is a partner of Cooper Brothers & Co., a firm of chartered accountants practising in Malaysia, Singapore and Brunei. He is ordinarily resident in Malaysia for the year of assessment 1969. In 1968 he received from Singapore:

(i) $49,408 as his share of the income of Cooper Brothers for the year ending 31st May, 1968; and

(ii) $2,090 gross dividends from two companies resident in Singapore received during the calendar year 1968.

As the income was received in 1968, tax is payable (if at all) on it in respect of the year of assessment 1969.

So the law applicable is the law relating to the year of assessment 1969.

The respondent maintains that he is exempt from tax by virtue of an Agreement dated 16th August, 1966, entered into between the Malaysian and Singapore Governments which was given the force of law by the Double Taxation Relief (Republic of Singapore) Order made under the Income Tax Ordinance, 1947 (section 45), and published as P.U.385 dated 27th October, 1966. I shall refer to this Agreement as the 1966 Agreement.

The appellant, Director-General of Inland Revenue, on the other hand, maintains that the respondent is not so exempt because at the material time the 1966 Order had been revoked, when the Ordinance itself was replaced by the Income Tax Act, 1967, with effect from 1st January, 1968; particularly because the 1966 Agreement had been specifically replaced by another Agreement entered into between the Malaysian and Singapore Governments, which agreement was given the force of law in Malaysia by the Double Taxation Relief (Singapore) Order, 1968, made under section 132 of the new Income Tax Act and published as P.U.518 dated 26th December, 1968. I shall refer to this Agreement as the 1968 Agreement.

The Special Commissioners held that the respondent was exempt from tax and the learned appeal judge who heard the Director-General's appeal in a judgment reported at [1973] 2 M.L.J. 22 agreed. The Director-General has appealed to this court.

Here as below the question for decision is whether the appellant is exempt from tax or not.

It is common ground that this case turns on the construction of the two Agreements.

The relevant provisions of the 1966 Agreement are set out below.

"1966 Agreement

Article IV

1. (a) The profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carries on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment. No further tax shall be imposed in Malaysia in respect of profits of the permanent establishment which are remitted to Malaysia.

Article VII

1. Dividends paid by a company which is a resident of —

(a) Malaysia, shall be treated as derived from a source in Malaysia, except to the extent to which the profits of the company are derived from sources in Singapore; and

(b) Singapore, shall be treated as derived from a source in Singapore, except to the extent to which the profits of the company are derived from sources in Malaysia.

2. Dividends paid by a company which is a resident of one of the Contracting States shall be charged to tax by the respective Contracting States to the extent to which the dividend represents a distribution of profits derived from sources in those Contracting States. No further liability shall be imposed on the shareholder by reference to liability on an income received basis.

Article XVII

1. The laws of each Contracting State shall continue to govern the taxation of income in that State except where express provision to the contrary is made in this agreement. Where income is subject to tax in both Contracting States, relief from double taxation shall be given in accordance with the following paragraphs of this Article.

2. Where a resident of one Contracting State derives income from sources within the other Contracting State and that income in accordance with the income tax law of each Contracting State and the provisions of this agreement is subject to tax in the other Contracting State, the former Contracting State shall exempt such income from tax."

There is provision in the 1966 Agreement itself for its termination. This is to be found in Article XXI, paragraph 2, which reads —

"This agreement shall continue in effect indefinitely, but either of the Contracting States may, on or before the 30th day of June in any calendar year give to the other Contracting State notice of termination, and, in such event, this agreement shall cease to be effective after the last day of the calendar year in which the notice is given."

Notice of termination was given by the Malaysian Government to the Singapore Government on 25th June, 1968, as follows: —

"Notice is hereby given to terminate the agreement so that it will cease to be effective from the year of assessment commencing from January 1969."

Of the 1968 Agreement only Article XXI is relevant. It is in the following terms:

"1. This agreement shall come into force on the date when the last of all such things shall be done in Malaysia and Singapore as are necessary to give the agreement the force of law in Malaysia and Singapore, and shall thereupon have effect as respects —

(a) Malaysian tax for the year of assessment 1969 and subsequent years of assessment;

(b) Singapore tax for the year of assessment 1969 and subsequent years of assessment.

2. Nothing in this agreement shall affect:

(a) anything duly done or suffered to be done; or

(b) any right, privilege, benefit, obligation or liability acquired, accrued or incurred,

under the provision of the agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed on the sixteenth day of August 1966 (hereinafter referred to as the 1966 agreement) *up to and including the year of assessment 1968.*

3. *Paragraph 2 of this Article shall not extend the 1966 agreement beyond the last day of the year of assessment 1968.*"

The significance of the words italics will appear in a moment.

Both the Special Commissioners and the learned appellate judge held, contrary to the Revenue's contention, that the respondent was exempt from tax under the 1966 Agreement and that that exemption continued to have effect for the year of assessment 1969 by virtue of paragraph 2 of Article XXI of the 1968 Agreement and by virtue of other provisions of the Income Tax Act, 1967, which are mentioned in the judgment appealed from and which I do not think it necessary to mention here.

Before us the Revenue advances several arguments why the judgment cannot be right. Because of the view I take, it is necessary to deal only with one argument, namely, that because of an amendment to the 1968 Agreement made since that judgment and before the hearing of this appeal, it is now clear that any benefit accruing to the respondent under the 1966 Agreement cannot be carried forward to the year of assessment 1969.

Assuming, without deciding, that the respondent was exempt from tax under the 1966 Agreement, this appeal must in my view be allowed.

When this matter came up before the Special Commissioners and later before the learned appellate judge, Article XXI of the 1968 Agreement did not have the words italics in the passage reproduced above. Without those words it was arguable that the respondent, if he enjoyed exemption under the 1966 Agreement, also enjoyed exemption in respect of the year of assessment 1969. But since that judgment the words in italics have been added by a supplementary agreement entered into between the Malaysian and Singapore Governments, which supplementary agreement was given the force of law by the Double Taxation Relief (Singapore) Order, 1973, published as P.U.(A) 211. Furthermore, it is expressly provided by Article II of the supplementary agreement that that agreement "shall be read as part of the [1968] Agreement and shall be deemed to have effect from the same date as the [1968] Agreement.

In my judgment no matter what the position might have been under the 1968 Agreement before the amendment, it is now plain after the amendment that any "benefit" enjoyed by the respondent under the 1966 Agreement can be enjoyed only up to and including the year of assessment 1968, not beyond the last day of that year of assessment, and therefore not in respect of the year of assessment 1969, which is the material year here.

I would therefore allow this appeal.

As regards costs, I think that in the special circumstances of this case there should be no order as to costs either here or below. The respondent is an accountant familiar with the income tax law. In view of the language of Article XXI of the 1968 Agreement before the amendment the position he took was arguable, as was shown by the fact that the Special Commissioners and later the appellate judge agreed with him. If the amendment had been made before the hearing before the Special Commissioners, it is unlikely that the respondent would have engaged in litigation which has proved needless.

Ong Hock Sim F.J.: This is an appeal by the Inland Revenue from the judgment of Gill F.J. affirming the decision of the Special Commissioners in an appeal by the respondent to them to determine the question "whether the income which the respondent had derived and received from the Republic of Singapore by way of his share of the income of a partnership and dividends in the year 1968 was exempt from tax for the year of assessment 1969 under the provisions of the Double Taxation Relief (Republic of Singapore) Order, 1966 which incorporated the Agreement dated 16th August, 1966 (hereinafter referred to as the 1966 Agreement), entered into between the Government of Malaysia and the Government of the Republic of Singapore, or whether the said income ceased to be so exempt on the repeal of the Double Taxation Relief (Republic of Singapore) Order, 1966, by Section 155 of the Income Tax Act, 1967, with effect from 1st January, 1968, and by virtue of the provisions of the Double Taxation Relief (Singapore) Order, 1968, which incorporated the Agreement dated 26th December, 1968, (hereinafter referred to as the 1968 Agreement), entered into between the said Governments".

The facts of the case as admitted or proved are simple. The respondent is a partner of Cooper Brothers & Co. a firm of chartered accountants practising in Malaysia, Singapore and Brunei. He also has shares in two companies resident in Singapore. In 1968, the respondent received from Singapore a sum of $49,408 as his share from the partnership and a sum of $2,090 being gross dividends from his shares in the two companies.

As the financial year of the partnership ended on the 31st May each year, the period 1st June, 1967 to 31st May, 1968 was the basis period for the year of assessment in relation to the respondent's share of the income from the partnership under section 21(2) of the Income Tax Act, 1967. In relation to the gross dividends from his shares in the two companies the basis year for the year of assessment 1969 under section 20 of the Act was the calendar year 1968.

The Special Commissioners decided that by virtue of paragraph 33 of Schedule 9 of the Income Tax Act and paragraph 2 of Article XXI of the 1968 Agreement the respondent was entitled to exemption from Malaysian income tax in accordance with the exemption clauses in Articles IV, VII and XVII of the 1966 Agreement and under section 127 of the Income Tax Act, 1967.

It is the contention of the Revenue that the Double Taxation Relief (Republic of Singapore) Order, 1966 which incorporated the 1966 Agreement as a Schedule thereto (P.U. 385 of 1966) made pursuant to section 45 of the Income Tax Ordinance, 1947 was repealed by section 155(2) of the Income Tax Act, 1967 with effect from 1st January, 1968, the Income Tax Ordinance 1947, having itself been repealed by section 155(1) of the Act. It is further argued that if the 1966 Agreement ceased to be effective after 31st December, 1967 (although terminated officially pursuant to the Agreement only on 31st December, 1968), and the 1968 Agreement applies only as from the year of assessment 1969, the year of assessment 1968 was a period which was not covered by either of the two Agreements.

The Special Commissioners took the view that paragraph 33 of Schedule 9 read together with paragraph 2 of Article XXI of the 1968 Agreement preserved the exemption clauses in the 1966 Agreement beyond 1st January, 1968.

Paragraph 33 reads:

"Any exemption from any previous tax or from any provision of a repealed law shall, if it was made under a repealed law and was effective on 31st December, 1967, be deemed to have been made by an order under section 127 in relation to tax imposed by this Act or in relation to the corresponding provision of this Act, as the case may be:"

Paragraph 2 of Article XXI of the 1968 Agreement is as follows:

"2. Nothing in this agreement shall affect:

(a) anything duly done or suffered to be done; or

(b) any right, privilege, benefit, obligation or liability acquired, accrued or incurred,

under the provision of the agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed on the sixteenth day of August 1966 (hereinafter referred to as the 1966 agreement)."

Before us, it was contended by the Appellant that there is a distinction between "exemption" granted under section 13 of the 1947 Ordinance and section 127 of the 1967 Act and "relief" under section 45 of the 1947 Ordinance and section 132 of the Act. This, in my view, is a mere quibble. The Agreements themselves in Article III speak of provisions that income "shall be *exempted* from tax" and in Article IV that certain income "shall not be taxable". Paragraph 33 should not be construed in the limited sense contended by the Appellant that "exemption from any previous tax" should be confined only to exemptions pursuant to section 13 of the 1947 Ordinance or section 127 of the 1967 Act. I am further of the view that the second part of paragraph 33 relating to "exemption . . . from any provision of a repealed law" would include a provision affording relief from tax payable under some other provision of the 1947 Ordinance or 1967 Act.

I agree with my brother Gill that the decision of the Special Commissioners that the respondent's profits which he received from Singapore in 1968 are exempt from Malaysian income tax by virtue of paragraph 33 of Schedule 9 to the Income Tax Act, 1967 and paragraph 2 of Article XXI of the 1968 Agreement. Resort to this tortuous method of preserving the benefits and giving effect to the intention of the 1966 Agreement to cover the year of assessment 1968 is now, in my view, rendered unnecessary as a result of the Double Taxation Relief (Singapore) Order, 1973 (P.U. (A) 211 of 1973) which was made after the judgment but before the hearing of this appeal. I reproduce paragraph 2 of Article XXI with the amendment italicized: —

"2. Nothing in this agreement shall affect:

(a) anything duly done or suffered to be done; or

(b) any right, privilege, benefit, obligation or liability acquired, accrued or incurred,

under the provisions of the agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed on the sixteenth day of August 1966 (hereinafter referred to as the 1966 agreement) *up to and including the year of assessment 1968.*

3. *Paragraph 2 of this Article shall not extend the 1966 agreement beyond the last day of the year of assessment 1968;*"

Article II of the Supplementary Agreement provides that it "shall be read as part of the Principal Agreement and shall be deemed to have effect from the same date as the Principal Agreement."

I am of the opinion that the amendment was enacted for the sole purpose of ensuring continuity and clarifying any doubt that the year 1968 was a year of *no agreement* when neither the 1966 Agreement nor the 1968 Agreement was applicable and in the context of the whole agreement "the year of assessment 1968" should be read as defined in section 2 to mean the "calendar year" 1968.

The only question here is whether this amendment has retrospective effect. I refer to *Craies* on Statute Law (7th Edn.) at page 395:

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or, as Parke J. (afterwards Baron Parke) said in *R.* v. *Dursley*, (1832) 3 B. & Ad. 465, 469 'to 'explain' a former statute,' the subsequent statute has relation back to the time when the prior Act was passed. Thus, in *Att.-Gen.* v. *Pougett*, (1816) 2 Price 381, 392 it appeared that by a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson C.B., in giving judgment for the Attorney-General, said: 'The duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act'."

In the instant case, there has been a change in the law since the decision of the High Court and before the hearing of this appeal. Can this court take the new amendment into consideration to arrive at its decision? I would quote from Lord Denning in *Attorney-General* v. *Vernazza*: [1]

"But what about the Court of Appeal? The new Act was passed after the judgment of the High Court and before the hearing in the Court of Appeal. Can the Court of Appeal take the new Act into account and make an order under it or must it leave the Attorney-General to make a fresh application to the High Court? It is, of course, clear that, in the ordinary way, the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings: see *Re Debtor, Ex p. Debtor* (No. 490 of 1935) [1936] Ch. 237, *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* [1938] 4 All E.R. 747; [1939] A.C. 1. But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only; for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance: see *Quilter* v. *Mapleson* (1882) 9 Q.B.D. 672 and *Stovin* v. *Fairbrass* (1919) 88 L.J.K.B. 1004. Those decisions seem to me to show that *the Court of Appeal can give effect to a retrospective Act passed in the interval since the case was at first instance, no matter whether it deals with vested rights or with procedure only;*"

Having come to the view that the amendent was intended to rectify an obvious omission and is retrospective, I would dismiss this appeal with costs and affirm the decisions of the judge and the Special Commissioners.

I am directed by the Lord President to say that he agrees with this judgment and has nothing further to add.

Appeal dismissed.

Solicitors: *Skrine & Co.*